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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1002

J. G. SAMARA, MICHAEL M. SAMARA, and CARROLL SAMARA,
Appellants,

VERSUS

STATE OF OKLAHOMA EX REL. THE OKLAHOMA
CAPITOL IMPROVEMENT AUTHORITY,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

J. G. SAMARA, MICHAEL M. SAMARA, and CARROLL SAMARA,
Appellants,

VERSUS

STATE OF OKLAHOMA EX REL. THE OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court is not yet reported, but is printed herein, in Appendix B (pp. iii-viii). The judgment of the trial court, and order overruling appellants' motion for new trial, are unreported, but are printed herein in Appendix D (pp. ix-xi).

JURISDICTION

Appellants hereby appeal from a final judgment of the Supreme Court of Oklahoma which affirmed a trial court judgment awarding damages for the taking of property in condemnation proceedings. The judgment of the Supreme

Court of Oklahoma was entered on April 21, 1964. Application for leave to file second petition for rehearing was denied on December 22, 1964. Notice of Appeal was filed in the Supreme Court of Oklahoma on December 23, 1964.

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by 28 U.S.C., Sec. 1257(2). The following cases sustain the jurisdiction of this Court to review the judgment on appeal in this case:

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 313; *State of Missouri* v. *Gehner*, 281 U.S. 313; *Dahke-Walker Milling Co.* v. *Bondurat*, 257 U.S. 282; *Saunders* v. *Shaw*, 244 U.S. 317.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent Oklahoma Statutes and federal constitutional provisions are set forth in Appendix A (pp. i-ii).

QUESTION PRESENTED

The question presented is:

Whether Fourteenth Amendment due process is violated by Title 66, Chapter 2, Oklahoma Statutes, as construed and applied in this case for the taking of the private property of appellants.

STATEMENT OF THE CASE

Three condemnation cases were instituted in the District Court of Oklahoma County, Oklahoma, by the appellee against appellants and others, disposition was made of the claims of the others, and the three suits were consolidated for the purpose of trial.

Appellants owned two buildings, partly on land owned by them and partly on land leased by them, across the street from the State Capitol of Oklahoma. One building was used as a restaurant known as Sussy's. The other building was used as a private club and was known as Shangri-La. Appellants owned personal property which was used in connection with their businesses.

Under the Oklahoma procedure, commissioners were appointed by the court, who set the value of the property belonging to the appellants and sought to be taken at $181,175.00. This amount was paid into court and appellee took possession of the property. Both parties were dissatisfied with the amount of the award, and asked for a jury trial. The jury returned a verdict in the amount of $140,000.00, and judgment was rendered accordingly.

The trial court refused to allow a new trial, and the Supreme Court of Oklahoma has refused to set aside its judgment, although:

1. The verdict was less than any person testified was the value of the property taken.

2. The court refused to permit the introduction of competent evidence submitted by appellants.

3. Plaintiff was guilty of prejudicial misconduct.

4. The judgment below is an unconscionably abusive and arbitrary exercise of state judicial power.

1.

The following table shows the values assigned to the properties by the designated witnesses. The reference to pages is to the record submitted herewith.

SOURCE	REAL ESTATE	SUSSY'S BLDG.	SHANGRI-LA	LEASEHOLD	PERSONAL PROPERTY	TOTAL
J. G. Samara					137,037.26 (pp. 331, 337, 346)	
Michael M. Samara						400,000 (p. 248)
Jack Ranier					150,000 (p. 378)	
Harry L. Curtis		254,650 (p. 386)				
Russell E. Swan						341,544 (p. 427)
J. Floyd Askew	40,000 (p. 525)	42,512 (p. 524)	31,840 (p. 524)	6,960 (p. 486)	20,000 (p. 486)	151,932
Frank Cross		132,700 (p. 536)			29,420 (p. 538)	162,120
Gerald Carlile					29,420 (pp. 548-549)	

There is no combination of these figures which gives as low a total as the jury verdict.

A witness, Bozalis, testified as to the reproduction costs of the buildings.

The testimony of Mr. Bozalis (C-M. 525-530) as to the reconstruction costs of buildings similar to the Sussy's Restaurant building and the Shangri-La Club building was based upon the assumption by Mr. Bozalis that these buildings were primarily of frame construction. It appears that Mr. Bozalis must have had these buildings confused with others being demolished in the same area, because the evidence in the record, including many photographs, discloses that neither of these buildings was of frame or even part frame construction. On the contrary, the evidence shows that Sussy's Restaurant was constructed of poured concrete slab floors with concrete block sidewalls and rear wall and brick front and the Shangri-La building was constructed entirely of tile bricks on all exterior walls plus a new front section which had been added of conventional brick. We invite the Court's attention to photographs, defendants' Exhibits 1 to 10, inclusive (C-M. 250-259) and 11 to 47, inclusive (C-M. 278-314).

Attention of the Court is also invited to the "brief description of improvements" contained in the Report of Commissioners (C-M. 114, 115, 116, 190). These descriptions show the exterior walls and foundation of Sussy's Restaurant building to be of concrete block and poured concrete with a brick vestibule area at the front of the building. The Shangri-La Club is described as having concrete foundation, part of the floor concrete slab, part wood

floor, exterior title brick, painted, with the front of the building having a brick facing.

The testimony of Mr. Bozalis as to the exterior construction of these buildings is as follows (C-M. 527):

Q. "The outside construction, please, sir, walls, what were they constructed of, what kind of material?

A. Well, it was a mixture of materials, but *primarily they were of frame construction.* There was some masonry used and so forth.

Q. Concrete blocks?

A. And concrete blocks, yes. That was your masonry primarily."

An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion and it is necessary that the facts upon which an expert bases his opinion are such as to permit a reasonably accurate conclusion as distinguished from mere guess or conjecture. 20 Am. Jur., Sec. 787-795.

The use of a "rule of thumb" cubic footage basis for estimating reproduction costs of buildings has been severely criticized by numerous authorities as highly unreliable. One of the most recent of these is the case of *Riley* v. *District of Columbia Redevelopment Land Agency,* 246 F.2d 641 (D.C. Circuit), in which the Court of Appeals criticized the use of reproduction costs of a building. In commenting on the testimony of witnesses for the Redevelopment Agency, the Court stated:

"They relied largely upon reproduction costs calculated on a rule of thumb cubic footage basis, less

depreciation. The testimony of one appraiser, especially, would have led the jury to believe that this is a formula for arriving at the fair market value. This is not so. While the jury could be informed by the witness of these calculations in explanation of the process by which he arrived at his opinion of fair market value, the calculations were not themselves evidence of fair market value for this type of property. There is no necessary relationship between reproduction costs and market value. Cost of reproduction is a method of valuation usually resorted to 'where the character of the property is such as not to be susceptible to the application of the market value doctrine.' (4 Nichols on Eminent Domain, 12.313.)

"There is no indication that this is true in this case. Furthermore, the rule of thumb basis for estimating cost of reproduction, used by the agency appraisers, has been described as being 'not even approximately accurate, except for a few highly standardized types of structures.' (2 Orgel, Valuation Under Eminent Domain, Sec. 193) . . . Accordingly, if such testimony is repeated on a new trial, the jury should be cautioned that it is before them only in explanation of the process by which the witness arrives at his opinion of fair market value, not as independent evidence of such value, and, further, that the cubic foot cost method of computing reproduction costs is not entitled to great weight in such a case as this, even in arriving at reproduction cost."

The reasoning above set forth would seem doubly true where the evidence in question is of the nature here involved. The witness Bozalis did not even use a cubic foot basis but rather a square foot basis which, of course, does not take into consideration the height of the structure or anything other than some standardized kind of interior.

The record in this case is replete with descriptions from the witnesses, Askew and Swan, of such things as carpeting, dance floor, built-in stereo equipment, walk-in refrigerators, upholstered booths and many other things which place these buildings in a far different category from a standardized shell structure. The evidence also shows that one of these buildings had an upstairs apartment and offices, although a calculation of the square footage based upon the exterior dimensions of the building would not take into consideration this additional space. Some of these things, coupled with the fact that Mr. Bozalis was completely mistaken as to the kind of material from which the buildings were constructed, undoubtedly account for his opinion being so different from that of the other witnesses called by the Authority.

There are many other cases in which courts have held that reproduction costs of buildings cannot be considered as independent evidence but only for the purpose of assistance in ascertaining market value. Some of these are the following:

In the case of *City of Chicago* v. *Giedraitis*, 150 N.E.2d 577 (Illinois), the Supreme Court held it was improper to determine the market value of improved property by adding together values for the land and the buildings thereon, the Court stating that the property must be considered as a single unit.

In *Bruce* v. *State*, 176 A.2d 846 (R.I. 1962), the Court said:

> "In Hervey v. City of Providence, 47 R.I. 378, 133 A. 618, it was held that evidence of the value of build-

> ings on the land separate from the market value of the land itself was not admissible. 'Market value,' the Court said, 'is the value of the land and buildings as a unit.' . . ."

In *Vallejo R.R. Co.* v. *Home Savings Bank*, 24 Cal. App. 166, 140 Pac. 974, the Court, in excluding evidence of the value of buildings separate from the realty, stated:

> "Appellants sought by the same witness to show the market value of the improvements as separate from the realty; the Court held 'that the testimony must go to the market value of the property as a whole.'"

In the case of *Valentino* v. *Commonwealth*, 329 Mass. 367, 108 N.E.2d 556, the Massachusetts Supreme Court stated that separate items of cost were not to be considered as separate items of damage but should be considered only as they might affect the difference in market value before and after the taking.

In the case of *Baker* v. *Mississippi State Highway Commission*, 204 Miss. 166, 37 So.2d 169, citing *Mississippi State Highway Commission* v. *Corley*, 195 Miss. 437, 191 So. 119, the Court states that the measure of damages on ordinary condemnation cases is the fair market value of the property before as compared with after the taking and held that evidence relating to the cost of restoring the property or improvements to their former state of usefulness will be admitted only as tending to establish true market value.

In *James Poultry Company* v. *Nebraska City*, 135 Neb. 787, 284 N.W. 273 (*rehearing denied and opinion supplemented*, 176 Neb. 456, 286 N.W. 337), Nebraska Supreme

Court stated that while many items of damage could be considered, they could not be considered as independent items but solely for the purpose of determining market value.

In the case of *State Highway Commissioner* v. *National Fireproofing Corporation*, 127 N.J.L. 346, 22 A.2d 268, the New Jersey Court of Error and Appeals held that damages in the nature of repairs to a plant used in mining operations should not be itemized and could be considered only in arriving at the diminution in the value of the property.

In *Gallimore* v. *State Highway and Public Works Commission*, 241 N.C. 350, 85 S.E.2d 392, the North Carolina Supreme Court held that separate items of damage could be considered only in relation to the market value of the property and in *Proctor* v. *State Highway and Public Works Commission*, 230 N.C. 687, 55 S.E.2d 479, the Court held that buildings must be regarded as part of the real estate on which they stand.

In *Dougherty* v. *Allegheny County*, 370 Pa. 239, 88 A.2d 73, the Pennsylvania Supreme Court held that it was error to permit testimony of the value of buildings separate and apart from the land or of land separate from the buildings.

In *State* v. *Ward*, 112 Utah 452, 189 P.2d 113, the Utah Supreme Court held that costs of reconstructing certain structures was appropriate only when they accurately measure the decrease in market value, stating the general rule to be the difference between the market value of the property with improvements thereon before and after the condemnation.

In this case no witness testifying to the market value of the entire property gave an opinion as low as the jury verdict. The three commissioners appointed by the Court, Harrison Levy, Richard C. East, and William S. Winter (all recognized reputable appraisers) fixed the total value of the property taken at $181,175.00. They itemized it (C-M. 125) at $170,175.00 for land and buildings and $11,000.00 for the leasehold estate (C-M. 192). The method of calculation used by these appraisers is set forth in detail (C-M. 116-121). While these figures were not before the jury they may and should be considered by this Honorable Court in its "search for the truth" to determine if defendants received the fair and impartial verdict to which they were entitled. The condemning Authority's witnesses, Askew and Grass, testified to figures of $151,932.00 and $162,120.00, respectively, and the defendants' witness, Swan (also a highly reputable appraiser), testified to a total figure of $341,000.00.

This is a complicated case, involving many factors, and to permit the verdict to stand would do the property owners a palpable injustice under all the evidence, unless it can be said unequivocally that the testimony of Bozalis, standing alone, was competent for the purpose of establishing independently the market value of the buildings on this land, and further that it was so clear, cogent and convincing as to be entitled to greater weight than the testimony of any other witness. This simply is not so. The Bozalis testimony not only was not admissible (or admitted) as independent evidence to supplant the opinions of Eskew, Grass or Swan, but it was calculated in a highly

unreliable manner and based upon erroneous assumptions of fact.

The court's Instruction No. 2 to the jury failed to include as an element of damages any personal property except that which was on the Dickson property. Substantial personal property valued at many thousands of dollars was on other property, its beneficial use has been taken from appellants, and in this extent the taking of that personal property is without any compensation whatsoever, and clearly in violation of the constitutional rights of appellants.

2.

Mr. Swan made an exhaustive appraisal and fixed the market value of the property taken at $341,544.00.

He was then asked as to a conversation with the representatives of the Capitol Improvement Authority in which his appraisal was discussed and explained by him. Objection was then made to this witness' testifying as to a statement made to him by the presiding officer of the Capitol Improvement Authority.

An offer of proof was then made that if the witness was permitted to answer the question he would testify that the presiding officer stated that the appraisers for the Authority agreed with his appraisal except for the rights or interests that were being appraised.

This admission on the part of the Authority was a vital part of plaintiff's case and deprived the jury of a fact necessary for their judgment.

In order to conform to the requirements of due process of law, rules of evidence must be reasonable and must afford an opportunity to present a case. *Crowell* v. *Benson*, 285 U.S. 22, 76 L.Ed. 598, 52 S.Ct. 285.

3.

The appellee brought into the courtroom a large mural which it offered in evidence. This was taken from the wall of the Shangri-La Club. The court sustained an objection of appellants to the admission of the mural. The face of the mural was not shown to the jury and the reaction of the jurors was that the mural was indecent or obscene. The appellee well knew the mural was not admissible, and by requiring appellants to object gave the jury the impression there was something to hide about it.

In interrogating Jake Samara, the principal owner of the property, counsel for appellee asked him if he had not signed documents under penalty of perjury that his total cost of equipment in Shangri-La was $18,599.48, and that he had depreciated it through 1960 to $16,416.23. Counsel for appellants objected to this line of questioning, which objection was sustained. The appellee well knew this line of questioning was not admissible, but by forcing the objection, the prejudicial implication was made that there was something being concealed, and that Samara had made false income tax returns.

In this regard the questions asked were if the defendant had not *signed documents under penalty of perjury* and (after an objection was sustained to the use of "under penalty of perjury") that he had "*signed statements*" con-

cerning various phases of his equipment costs and operations, giving figures which included both dollars and cents, thus giving the impression of exactness, for example, such figures as $1,200.61, $18,599.48, $16,416.23, and many others. These figures were taken *directly* from the defendant's *state income tax returns* which had not been furnished and which had been somehow illegally obtained by plaintiff and its attorney.

On a number of occasions objections were made to these questions, and finally defendant's counsel insisted on knowing where the figures were coming from. Although the record does not show the discussion in chambers, the Court will recall that counsel for plaintiff was specifically asked if he had copies of the defendant's tax returns, which are privileged and which he could not under any circumstances offer in evidence under 68 O.S. 1454. Counsel for plaintiff denied having copies of the tax returns, but vaguely stated (as we recall) that the figures were furnished him by the auditor for the Capitol Improvement Authority and he assumed they were taken from Mr. Samara's books and records. With this explanation the court permitted him to continue to ask these questions and there was nothing that counsel for defendant could do to prevent it, although the statements contained in the questions indicating that Mr. Samara had *signed statements* listing certain amounts of money to the penny, as income, profits and losses, inventories, etc., could indicate absolutely nothing except to infer to the jury that he was reading from the defendant's tax returns, and thus import truth and verity to such statements and figures.

As a matter of law, contradictory statements, or statements against interest, may be used for the purpose of impeaching a witness, but a contradictory statement may not be used if it is not otherwise admissible. Here, counsel was purportedly setting a predicate which he never intended to use but instead intended for the questions themselves to give the jury the impression of the truth of the statements of counsel as evidence in the case.

In *Kelso* v. *Independent Tank Co.* (Okla.), 348 P.2d 855, the Court stated that a prior inconsistent statement may be used for impeachment purposes *provided it is not inadmissible on some other ground such as privilege.* Likewise, in *Hern* v. *Blakeney and Ambrister*, 146 Okla. 122, 203 Pac. 225, it was held that a contradictory statement of a witness is admissible for impeachment *only if the statement itself could be introduced for some other purpose.*

The vice in such tactics is in the mere asking of the improper question. In *Houston* v. *Pettigrew* (Okla.), 353 P.2d 489, the Court said:

> "A party forced to object to an improper question may, by his objection, create an inference that the answer to the proffered question would establish a fact adverse to his interest, and therefore the posing of such a question may result in reversible error, if such a question is posed for the purpose of arousing the sympathy or passion of the jury or planting prejudice in their minds, and the fact that the jury is admonished not to consider the question asked or the answer given does not in all instances serve to cure such error."

There is also considerable discussion of this particular subject in Wigmore on Evidence. For instance, in Section 1808 of the text, it is said:

> ". . . so far as feasible, no statement of proposed evidence should be allowed to be made in such a way as to allow the jury to obtain an impression of its truth and relevancy and to place the opposing counsel at the disadvantage of objecting to proposals whose known tenor may be misused against his party.
>
> "(2) The same general principle governs the *putting of questions to witnesses*. The jury may under certain circumstances obtain an impression from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question. When a counsel puts such a question, believing that it will be excluded for illegality or will be negatived and also having no reason to believe that there is a foundation of truth for it, he violates professional honor."

Among the various cases cited in Wigmore in support of the above proposition are *Freeman* v. *State*, 20 Okla. Cr. 442, 203 Pac. 1052; *Gullatt* v. *State*, 80 Okla. Cr. 208, 158 P.2d 353; *Combes* v. *State*, 97 Okla. Cr. 283, 192 P.2d 524. Although all of the Oklahoma cases cited happen to be criminal cases, various cases from other jurisdictions are cited in support of the same proposition which are not criminal cases, and the Oklahoma case of *Houston* v. *Pettigrew, supra*, and cases cited therein follow the rule.

Further, Wigmore, Section 780, cites Chitty, Practice of the Law, 2nd Ed., III, 901, as follows:

"It is an established rule as regards cross-examination that a counsel has no right, even in order to detect or catch a witness in a falsity, *falsely to assume or pretend that the witness had previously sworn or stated differently to the fact*, or that a matter had previously been proved when it had not. Indeed if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society."

On the proposition that impeaching testimony cannot be used where such testimony would not be admissible if offered in evidence independent of impeachment see *Harris Erby Cotton Company* v. *Duncan*, 57 Okla. 761, 157 Pac. 746; *Weber* v. *Rusch*, 117 Okla. 4, 245 Pac. 46.

The general rule concerning the requirements for laying a predicate for impeachment is stated in 58 Am. Jur., § 779, p. 427:

"The method of laying a foundation for impeachment of a witness by proof of his prior inconsistent statements is quite uniform in the various jurisdictions. Cross-examination of the witness should be allowed for such purpose. It is not sufficient merely to ask the witness on cross-examination whether he made the particular statements. The very occasion must be presented to the mind and attention of the witness as well as it can be within the limits of reasonable endeavor. He should be informed what the statements were and the conditions and circumstances under which they were made. It is important that his attention be called on cross-examination to the particular time and occasion when, the place, where, and the person to whom he made the statements. The rule is statutory in some jurisdictions. In no other way can a foundation be laid for putting in the impeaching testimony."

4.

The sum of the errors on the part of the trial court was to use the provisions of the state law of Oklahoma which provide for the taking of private property for public use in a manner which was arbitrary, discriminatory, and unreasonable, and to deprive appellants of their property without due process of law, and to deny to appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

The constitutional provisions which affect the power of eminent domain are for the protection of the individual property owner from the aggression of the government. The exercise of eminent domain is limited by the inhibition against depriving a person of his property without due process of law. *Bank of Columbia* v. *Okeby*, 4 L.Ed. 559; *Ownbey* v. *Morgan*, 256 U.S. 94, 65 L.Ed. 837, 41 S.Ct. 433; *Curry* v. *McCanless*, 307 U.S. 357, 83 L.Ed. 1339, 59 S.Ct. 900.

The taking without adequate compensation is a violation of the constitution. *Monongahela Nav. Co.* v. *U. S.*, 148 U.S. 312, 37 L.Ed. 463, 13 S.Ct. 611; *West* v. *Tel. Co.*, 295 U.S. 662, 79 L.Ed. 1640, 55 S.Ct. 894.

Regard must be had to the substance of the taking, not merely the formalities thereof. *Chicago etc. R. Co.* v. *Chicago*, 166 U.S. 226, 41 L.Ed. 979, 17 S.Ct. 581.

CONCLUSION

For the above reasons, appellants submit that this appeal presents federal questions of national importance which warrant plenary resolution by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 66, Section 55, Oklahoma Statutes, is as follows:

> "The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party in the Clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection, or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him by the assessment of the commissioners, all costs in the district court may be taxed against him."

Title 66, Section 56, Oklahoma Statutes is in part as follows:

[APPENDIX]

"Either party aggrieved may appeal from the decision of the district court to the Supreme Court . . ."

Title 66, Section 57, Oklahoma Statutes is in part as follows:

"The provisions of this article with reference to eminent domain shall apply to all corporations having the right to eminent domain, and shall apply to the State of Oklahoma and its various educational, reformatory, penal and eleemosynary institutions, including departments of state having the power to purchase real property for public purposes, and such institutions and departments shall have the right under this article to acquire fee simple title to the property taken. . . ."

APPENDIX B

Filed
Supreme Court
of Oklahoma
Apr 21 1964
Andy Payne
Clerk

OPINION AND JUDGMENT OF THE SUPREME COURT OF OKLAHOMA

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

J. G. Samara, Michael M. Samara and Carroll Samara, Plaintiffs in Error,	)	
vs.	)	No. 40,458
State of Oklahoma ex rel. The Oklahoma Capitol Improvement Authority, Defendant in Error.	)	

* * * * * *

APPEAL FROM DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HON. A. P. VAN METER, JUDGE

From a judgment fixing the amount of defendants' recovery on the jury verdict and also the judgment fixing the amount the defendants should return to plaintiff, which was the difference in the amount fixed by the jury and the amount fixed by the Commisisoners, the defendants have appealed.

AFFIRMED

Stagner, Alpern & Powers,
Rinehart, Morrison & Cook,
Oklahoma City, Oklahoma, For Plaintiffs in Error.

[APPENDIX]

Charles R. Nesbitt,
Attorney General,

Harvey H. Cody,
Assistant Attorney General,
Oklahoma City, Oklahoma, For Defendant in Error.

HALLEY, V.C.J.:

The State of Oklahoma ex rel. The Oklahoma Capitol Improvement Authority brought three actions in the District Court of Oklahoma County to condemn certain property. J. G. or Jake Samara was a defendant in Case No. 151,751. He was a defendant in Case No. 152,265 and Case No. 152,266, along with Michael M. Samara and Carroll Samara. These three cases were consolidated and proceeded under Case No. 152,266. Commissioners were appointed in each case and awards made. In Case No. 151,751 Jake Samara was denied an award and asked for a jury trial. In Case No. 152,265 the plaintiffs demanded a jury trial. In Case No. 152,266 both plaintiff and defendants requested a jury trial. Commissioners had fixed the award to defendants at $170,750 in Case No. 152,265, and at $11,000 in Case No. 152,266, making a total allowed the defendants of $181,750. Defendants received the compensation awarded.

After the consolidation the matter was tried to a jury and verdict rendered for the defendants for $140,000 and judgment entered thereon for the plaintiff against the defendants in the sum of $41,750. From the judgment the defendants appealed.

Parties will be referred to as in the court below.

The defendants ask for a new trial on four grounds as follows:

"1. The verdict was less than is supported by the evidence.

"2. The court erred in refusing to admit competent evidence tendered by plaintiffs in error.

"3. Plaintiff was guilty of misconduct which required a new trial.

"4. The court erred in refusing to give Instruction No. 2 requested by plaintiffs in error."

We will discuss these contentions in the above order.

As to defendants' Proposition One to the effect that the verdict was not sustained by the evidence, we cannot agree. There was evidence that the real estate involved here was of the reasonable value of $40,000; that Sussy's building could be reproduced for $30,884; and Samara's Shangri-La could be reproduced for $25,200, without figuring depreciation; the value of the leasehold estate was estimated by one witness at $6,960; another witness testified that the value of personal property converted was $20,000. This would total $123,044. It is well settled in this jurisdiction that in a condemnation proceeding wherein a verdict and judgment thereon is reasonably sustained by the evidence that the same will be approved on appeal. Western Farmers Electric Coop. v. Yates, Okl., 288 P.2d 723; Denney v. State ex rel. King, 179 Okl. 35, 64 P.2d 298; City of Cushing v. Pote, 128 Okl. 303, 262 P. 1070.

We cannot see that the defendants have in any way established their second proposition that the trial court erred in not admitting a statement attributed to the presiding officer of the Capitol Improvement Authority that "the appraisers for the Authority agreed with defendants' witness Swan except for the rights or interests that were being appraised." (Defendants' attorneys' offer of proof.) There was nothing to show that the presiding officer had any right to bind the Authority in any way.

73 O.S. 1961 § 152(c) provides in part as follows:

"* * * Three (3) members of the Authority shall constitute a quorum and the vote of three (3) mem-

bers shall be necessary for any action taken by the Authority. * * *"

Under the foregoing the Authority could not be bound by one member of the Authority. In 31A C.J.S., Evidence § 359, this statement is found:

> "Statements of a public officer in the absence of express authority are not competent against the national or a state government or agency thereof; and while in some instances the declaration of an official may constitute an admission of the federal or state government or agency, even where the necessary authority is conferred the statement is admissible only if it was made within the scope of such authority, and contemporaneously with the event or transaction involved."

As to defendants' third proposition that "Plaintiff was guilty of misconduct which required a new trial," we are of the opinion that the alleged misconduct was not sufficient to justify a new trial. Certain murals were offered in evidence by plaintiff and objected to by defendants and the objection sustained. There was nothing to indicate that the defendants were prejudiced by the offer. If there was error here, which we do not see, and if it was, it would have been harmless. 12 O.S. 1961 § 78.

We have also studied under this complaint the alleged improper cross-examination of J. G. Samara and we are unable to find any error to which the trial court did not properly sustain an objection. These questions had to do with the records and tax returns of J. G. Samara's operations of the businesses on property being condemned. There was clearly no abuse of discretion on the part of the trial court in refusing to grant a new trial on this alleged error. See Ratcliff v. Sharrock, 44 Okl. 592, 145 P. 802, and Yarbrough v. Bellamy, 197 Okl. 493, 172 P.2d 801.

Defendants' fourth proposition that the trial court erred in not giving requested Instruction No. 2 is without

merit because we think that the trial court's Instruction No. 9 was correct. Value for good will and loss of business were excluded both by the instruction given and the instruction requested. Instruction No. 9 is as follows:

> "You are instructed that you shall render one verdict for a total sum which you find to be the fair market value, as that term is defined in these instructions, for (a) Lots 15, 16, 17 and 18, Block 3, Lucille's Addition to Oklahoma City, Oklahoma, referred to in the testimony as the Samara Lots, (b) the leasehold estate of the defendants under the lease from Tessie T. Dickson covering a portion of the Shangri-La property, (c) the portions of the two buildings owned by defendants but located on leased properties, (d) the improvements to the building owned by Tessie T. Dickson which were removable by defendants upon the termination of their lease, and including any personal property of defendants located on the premises at the time of the taking which you find from the evidence the defendants were deprived from using further or which was rendered of no further value to the defendants. Your verdict shall not include any value for good will or for loss of business and shall not itemize the various items included."

There is no marked dissimilarity between the requested instruction and the instruction given. The foregoing instruction covers the case properly. There was no reason to instruct on possible theories of plaintiff and defendants. It was simply the problem of determining the value of real and personal property that was taken by the plaintiff. In addition to this, Instruction No. 8 makes crystal clear what should be considered in arriving at the damages to be assessed by the jury. It was not excepted to. We set out Instruction No. 8:

> "Testimony has been introduced regarding the value of the real property and the leasehold interests, and as

to improvements placed on the premises in question by the defendants and of which defendants claim was of no further value. The facts and circumstances shown by this testimony should be considered by the jury only in so far as it may or may not throw light on the crucial inquiry in this case, to-wit: what was the fair market value of all property, including leasehold interest, of the defendant which has been taken or damaged, and not for the purpose of furnishing separate items to be compensated for in addition to the said fair market value."

Carter Oil Co. v. Johnston, 208 Okl. 564, 257 P.2d 817; 14 Okla. Digest, Trial, Key No. 260(1).

The judgment of the trial court is affirmed.

BLACKBIRD, C.J., and DAVISON, JOHNSON, WILLIAMS, JACKSON and IRWIN, JJ., concur.

APPENDIX C

Order of Oklahoma Supreme Court Denying Petition for Rehearing

Filed
in Supreme Court
of Oklahoma
Dec. 22, 1964
Andy Payne, Clerk

In the Supreme Court of the State of Oklahoma
December 22, 1964

The Clerk Is Directed To Enter The Following Orders:

40458—J. G. Samara, et al v State of Oklahoma ex rel The Oklahoma Capitol Improvement Authority. Rehearing and oral argument denied.

Harry L. S. Halley,
Vice Chief Justice

APPENDIX D

JUDGMENT OF TRIAL COURT

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA
[Caption omitted]

JUDGMENT ON THE VERDICT

Now on this 14th day of May, 1962, the above matters coming on for jury trial pursuant to regular assignment and agreement of the parties that the said cases be consolidated for trial which has been done heretofore by proper Order of the Court, the plaintiff appeared by its attorney, Curtis P. Harris, and announced ready for trial; the defendants, J. G. Samara and Michael M. Samara, appeared in person and by counsel, Gus Rhinehart and LeRoy Powers, and the defendant Carroll Samara, not appearing in person, appeared by counsel, Gus Rhinehart and LeRoy Powers; all parties announced ready for trial and the Court ordered the trial to proceed. A jury was duly impaneled and sworn and the defendants introduced evidence, and at 4:30 P.M. the case was recessed until the following morning at 9:00 A.M. May 15, 1962, the jury having been properly and lawfully admonished by the Court.

And now on this 15th day of May, 1962, all parties appearing as herein set out for the previous days, and at 9:00 A.M. the jury was properly seated in the box and the defendants offered further evidence and rested.

The plaintiff introduced its evidence and rested. The Court instructed the jury as to the law in the case, and arguments of counsel for all parties was heard by the Court and jury, and the jury under proper instruction and under the charge of the sworn bailiff, retired to deliberate and

consider their verdict. After due deliberation, the jury returned its verdict into open Court in the afternoon of May 15, 1962, fixing the total amount of recovery of the above named defendants in the amount of $140,000.00. The jury verdict was properly inspected by the Court and read by the Court in open Court, and said verdict was ordered filed and judgment rendered thereon.

The Court having considered the verdict of the jury and being otherwise advised in the premises finds that the plaintiff had heretofore taken by these condemnation proceedings the interest in the real estate involved in said proceedings as owned by the above named defendants. Court Commissioners had heretofore been appointed in the proceeding and filed a report fixing the total just compensation, inclusive of all damages to which said defendants were entitled, at $181,175.00, said sum being awarded to the defendants for all their interests and damages involved in the above three consolidated cases.

The Court further finds that there was distributed to said defendants in the above three entitled cases, the total sum of $181,175.00. The Court finds that the amount awarded by the jury in the above three cases in the total sum of $140,000.00 should be decreed to be the just compensation and damages to which the defendants, J. G. Samara, Michael M. Samara and Carroll Samara, are entitled by reason of the plaintiff filing and acquiring the property interest of said defendants in the above three entitled cases. The Court finds that the plaintiff is entitled to a judgment against the above named defendants to recover back out of the sums heretofore distributed to them, $41,175.00, together with interest on said last sum at six per cent per annum from May 15, 1962, until paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above findings are made the judgment of the Court, and that judgment is entered against said

defendants, J. G. Samara, Michael M. Samara, and Carroll Samara, in favor of the plaintiff herein, in the total sum of $41,175.00, together with interest thereon at six per cent from May 15, 1962, until paid, for which let execution issue. The said defendants are ordered to pay back into the registry of the Clerk of this Court for the use and benefit of said plaintiff, the said sum of $41,175.00, plus six per cent thereon from May 15, 1962, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff has discharged all obligation to pay just compensation by reason of the filing of these condemnation proceedings, and that the said defendants above named having already received the amount of the jury verdict have no further claim against the plaintiff of any nature whatsoever by reason of these proceedings.

All costs accrued and accruing since the filing of the Report of Commissioners in these consolidated cases, are hereby assessed against J. G. Samara, Michael M. Samara and Carroll Samara.

To the entering of the above judgment the defendants except, and such exceptions are allowed.

A. P. VAN METER
District Judge

O. K.

Curtis P. Harris
Attorney for Plaintiff

Gus Rhinehart
Attorney for Defendants

Le Roy Powers
Attorney for Defendants

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JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1002

J. G. SAMARA, MICHAEL M. SAMARA, and CARROLL SAMARA,
Appellants,

VERSUS

STATE OF OKLAHOMA EX REL. THE OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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Attorneys for Appellee

April, 1965

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

J. G. SAMARA, MICHAEL M. SAMARA, and CARROLL SAMARA,
Appellants,

VERSUS

STATE OF OKLAHOMA EX REL. THE OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

FACTS

Appellants in a condemnation case have appealed to this Court from a jury award of $140,000.00 and judgment requiring the Appellants to refund the amount of condemnation money paid in excess of the $140,000.00, which amounts to $41,175.00. The judgment of the trial court has been affirmed, the petition for rehearing and the second petition for rehearing have been denied and final judgment was entered by the Oklahoma Supreme Court on December 22, 1964. Appellants have filed notice of appeal to the Supreme Court of the United States on the grounds that

the Oklahoma statute providing for the taking of private property for public use is arbitrary, discriminatory, unreasonable, deprives Appellants of their property without due process of law and denies to them the equal protection of the laws, all in violation of the 14th Amendment to the Constitution of the United States.

ARGUMENT

The appeal from the Supreme Court of Oklahoma does not involve any federal question raised, or preserved in the Oklahoma Courts. A review of the record of the case reveals that the Appellants never raised the federal question they raise in their Jurisdictional Statement, *viz.*, the Oklahoma Statute (56 O.S. 1961, §§ 56-57), violates the 14th Amendment to the United States Constitution. Appellants cite as the question presented by their appeal: "Whether Fourteenth Amendment due process is violated by Title 66, Chapter 2, Oklahoma Statutes, as construed and applied in this case for the taking of the private property of appellants" (Jurisdictional Statement, page 2). Appellants cite as supporting the jurisdiction of the Supreme Court of the United States to review this decision, 28 U.S.C., § 1257(2), which provides for appeals when the question of the validity of a state statute is raised, and the decision of the state court is in favor of its validity. On the other hand, 28 U.S.C., § 1257(3), provides for review by certiorari where the question raised is whether a state statute denies to an appellant a title, right, privilege or immunity, guaranteed by the Federal Constitution. The argument of Appellants that the verdict of the jury in the trial court was not supported by the evidence; that compe-

tent evidence was erroneously excluded; that the plaintiff was guilty of misconduct; and, that the judgment is unconscionable, abusive, and arbitrary (Jurisdictional Statement, page 3), is an argument that the state statute, as applied to Appellants, violates the Federal Constitution and therefore constitutes a ground for a petition for a writ of certiorari rather than for an appeal. *Mergenthaler Linotype Co.* v. *Davis*, 250 U.S. 256; *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U.S. 1.

The validity of the Oklahoma Statute was raised for the first time in the Appellants' Notice of Appeal to the United States Supreme Court. The federal question must be presented and preserved in the state court before review may be had by the United States Supreme Court. It may be raised for the first time in a petition to the state court for rehearing, if the interpretation of the state court could not have been reasonably anticipated. *Wilson* v. *Cook*, 327 U.S. 474; *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 303 U.S. 206; *State of Missouri* v. *Gehner*, 281 U.S. 313; *Saunders* v. *Shaw*, 244 U.S. 317. In the case at bar, the question presented was not the repugnancy of the state statute to the Federal Constitution, but the value of the property taken, and whether or not this value was properly ascertained.

Appellants, proceeding pursuant to Section 1257(2), have not presented a substantial federal question, and have not properly raised the federal question which has not been passed on by the Oklahoma courts; hence no substantial federal question is presented.

Proposition I

Appellants cite, in their table on page 4 of their Jurisdictional Statement, the figure $151,932.00 as the lowest estimate of value any witness testified to. Examination of the figures used in the table discloses an error in arithmetic. The figures, as testified to by Mr. Askew, should total:

$ 40,000.00
42,512.00
31,840.00
6,960.00
20,000.00
$141,312.00

The correct total of $141,312.00 is more than ten thousand dollars less than the figure quoted by Appellants. The record reveals testimony of witnesses which total a value considerably less than that alleged by Appellants. Mr. J. Floyd Askew testified (C-M. 484-486) that he included in his valuation the sum of $6,690.00 for depreciated leasehold value in his total appraisal. There were two leases involved. The first (C-M. 315-316) contained an "option of first refusal" in Clause (6), and the second (C-M. 464-465) contained no economically beneficial options. The jury could have well concluded that the lease rentals were equal to the actual value of the lease, and that the lease had no economic value above the actual rentals, or that the leases had a value anywhere between zero and $6,690.00.

Mr. Askew's testimony (C-M. 524) reveals that he allowed $10.00 per square foot for the 5,314 square foot Sussy's building and $11.00 per square foot for the 3600

square foot Shangri-La building for a total of $74,192.00 after 20 per cent depreciation. Mr. John Bozalis testified that the Sussy's building could be newly built for as little as $6.00 per square foot and the Shangri-La building for as little as $7.00 per square foot (C-M. 529). Depreciated at the same 20 per cent, Mr. Bozalis' valuation would total $45,667.20 or $28,524.80 less than Mr. Askew's valuation.

Mr. Askew valued the real property at $400.00 per front foot, or $40,000.00 total, but he also testified (C-M. 514) that land similarly situated had recently sold for $300.00 per front foot. Appellants' witness, Mr. Harry L. Curtis, testified (C-M. 410) that there has never been any land situated similar to Appellants' land which has sold for over $300.00 per front foot (C-M. 410). Therefore, there was evidence that the real property on a front foot basis, was not worth over $30,000.00 or $10,000.00 less than the estimate of Mr. Askew.

The three foregoing examples alone ($6,690.00 excessive lease valuation, $28,524.80 excessive building valuation, and $10,000.00 excessive land valuation) yield a total of $45,214.80 less than the $141,312.00 valuation by Mr. Askew, or a fair market valuation of $96,097.20. This figure is $43,902.80 less than the $140,000.00 verdict of the jury.

Appellants assert that the testimony of Mr. Bozalis was improper since Mr. Bozalis based his testimony on buildings of primarily frame construction while Appellants' buildings were of concrete block sidewalls and brick. In addition, Appellants assert that Mr. Bozalis used the "rule of thumb" basis for determining the value of Appellants' buildings. Appellants assert that in determining the value

of the property taken, the property must be considered as a single unit.

That Mr. Bozalis was not mistaken as to the property involved is shown by the record. Mr. Bozalis testified that he inspected the buildings both prior to and during demolition (C-M. 528). The report of the Commissioners (C-M. 114-116, 100) referred to by Appellants (Jurisdictional Statement, page 5), shows that one of the buildings was constructed of concrete blocks with interior walls of frame and sheet rock construction. The second building was constructed of part concrete slab and part conventional wood flooring, tile brick, and interior walls of fiberboard and plywood. Both buildings had roofs constructed over a wood deck. Mr. Bozalis, in addition to stating that he had inspected the buildings before and after demolition, stated (C-M. 527) that part of the construction was masonry and concrete blocks. The report of the Commissions shows that the buildings contained both block and frame construction. It is noted that no objection was made to Mr. Bozalis' expertise, or his identification of the buildings at the trial.

Mr. Bozalis testified as to the cost of construction of buildings such as were owned by Appellants in 1961, based on a square foot cost. The court expressly instructed that the testimony would be admitted, not as the test for determining the fair market value, but for the purpose of throwing light on the fair market value, and for no other purpose (C-M. 528). Mr. Bozalis testified that his estimate was based only on the building, and not on the furniture and fixtures contained therein, or the amount of money the property was capable of earning (C-M. 532-533). Far from using the square footage reconstruction cost less de-

preciation as the fair market value of the property, Mr. Bozalis made it perfectly clear from his testimony, and the court by its admonition to the jury, that the testimony was only one of the considerations in determining the fair market value of the property. The court instructed the jury that the "* * * 'fair market value' is the amount of money for which an owner would sell, though under no obligation to sell, and which sum a purchaser would pay, though under no obligation to buy" (C-M. 585).

In *Driver* v. *Oklahoma Turnpike Authority*, Okla., 343 P.2d 1079, the case was reversed and remanded because the trial court did not permit proof of replacement cost and original cost of dairy buildings on the remaining land, quoting from *State ex rel. Department of Highways* v. *Weaver*, Okla., 297 P.2d 549, which holds:

> "* * * evidence may be admitted of *specific* elements which contribute to the depreciation in market value."

The measure of damages in this case is the fair market value of the property at the time it was taken. That value is determined by considering all the elements that relate to such value. 4 Nichols on Eminent Domain, § 12.2.

Buildings or other improvements might either enhance or diminish the value of the land; but in this case, all the parties appeared to agree that the improvements were beneficial to the land. Hence, the reproduction cost of the improvements bore a reasonable relationship to the total value of the premises, and could be properly considered in determining total value.

Appellants' witness, Harry L. Curtis, testified on direct examination:

> Q. "Tell me what all did you take into consideration, *what all did you appraise* in making your appraisal? * * *
>
> A. The land, *the buildings*, and the lease, * * *."

And on cross-examination:

> Q. "Now, Mr. Curtis, in valuing these buildings and the leasehold estates, just what did you take into consideration with reference to the buildings? * * *
>
> A. *The cost of reproducing the building new and depreciating it.* * * *
>
> Q. Did you just take into consideration the walls, floor and roof?
>
> A. I just took the square foot cost * * *."

And Appellants' witness, Russell E. Swan, testified as follows:

> Q. "* * * what did you do in order to make this appraisal, what work did you go through?
>
> A. * * * First of all, the first thing in any appraisal is to establish an estimate of land value. * * *
>
> So, first, I established what, in my opinion, was the highest and best use. * * * and came up with an estimate of value for the land.
>
> Then, on the improvements, * * * their value is going to be based on one of three things. First, what we call our cost approval. *I estimate what it should cost to reproduce* these improvements today if they were new. * * *

> Then, from this figure I would deduct the depreciation * * *.
>
> This cost, just of the improvements, I add it to the land value and come up with an indication of value by the cost approach * * *."

Therefore, Appellants first injected "reproduction cost" into the trial, on the apparent theory that the buildings enhanced the value of the land, and that their intrinsic value should be considered in determining total value. Appellees were entitled to rebut this evidence by showing the buildings could be reproduced for a lesser sum.

Appellants contend that the trial court's Instruction No. 2 to the jury failed to include as an element of damages any personal property except that which was on the Dickson property. The Oklahoma Supreme Court found, and Appellees hereby contend, that any omission of Instruction No. 2 was covered by Instructions Nos. 8 and 9 (C-M. 587-589).

Proposition II

Appellants' second proposition relates to the exclusion of a purported "admission against interest" of the Capitol Improvement Authority, which Appellants contend was admissible.

The testimony of Appellants' witness, Mr. Swan, and the offer of proof, appeared in the record as follows (C-M. 426-430):

> Q. "* * * do you have an opinion as to the fair market value as of June 8, '61, of all those things combined?

A. I have.

Q. What is that opinion, please, sir?

A. * * * the total estimate of the market value of the real estate plus the personal property is $351,544.

Q. Now when did you make this appraisal for Mr. Samara?

A. My effective date of my *original* appraisal was December 20th of 1960.

Q. Would there be any difference in your valuations as of that time and * * * [June 8th] whatever the date is?

* * * * * *

A. No, sir. That is why I hesitated a minute ago, I wanted to check and make sure.

Q. Now, after you made this appraisal, did you furnish it to the Capitol Improvement Authority, and in fact, have a meeting with the Board and discuss the appraisal with them?

A. I personally did not furnish them a copy of my appraisal, but my appraisal was furnished to them by an attorney representing Mr. Samara, and I met with the Capitol Improvement Authority. Senator Gene Stipe and I met, representing Mr. Samara, and I believe there was about six or seven other persons in the room all representing the Capitol Improvement Authority, and we went with them for the purpose of going over my appraisal with them and explaining it to them.

Q. Now, about when was this?

A. I don't have the date here with me. I have the exact date in my file at my office, but I do not know the date at this time.

Q. As near as you remember it?

A. Oh, I—well, since this has been going on since 1960, and it is one of many cases that I have been on, I just can't—as I remember it, it was the 27th day of some month, but what month I couldn't tell you.

Q. All right, sir. In that meeting, I presume that you explained your appraisal to the members of the Authority?

A. Yes, sir.

The sole purpose of my—of that meeting, so far as I understood it and all that went on while we were there, we went page by page through my appraisal and I explained every step and how we arrived at—how I arrived at this estimate of value.

Q. Yes. If you can remember, who was presiding over that meeting, if you know?

A. I don't remember the name of the person presiding. At that time when I met with the Authority, that was my first introduction to the Authority.

The only person that I remember for sure was Mr. Robert Wheeler, the attorney who looked on my appraisal with me, sat next to me and shared my appraisal with me.

As I understand, the person in charge of the meeting was the Chairman of the Capitol Improvement Authority, but not knowing anyone by name at that particular time and I wasn't concerned with names as such, I just couldn't tell you by name.

Q. The Mr. Wheeler you mentioned awhile ago is another attorney representing the Improvement Authority.

Is that correct?

A. As I understand it, he was their attorney at that time. Whether he was their head attorney or not, I don't know.

Q. Was there any conversation between you and whoever was presiding over that meeting?

Mr. Harris: Your Honor, we object to this.

The Court: That will be sustained.

None of this has been material to this lawsuit but you haven't objected.

Mr. Powers: Your Honor, I think that this might be a matter of admissions against interest on the part of the presiding officer.

The Court: There isn't any such thing as against the State.

Mr. Powers: This is not the State, Your Honor.

The Court: There isn't any such a thing as against the Capitol Improvement Authority either then.

The objection will be sustained and an exception allowed.

(The following occurred outside the hearing of the jury:)

Mr. Powers: Come now the defendants and offer to prove that the presiding officer for the Capitol Improvement Authority at the meeting referred to by Mr. Swan told Mr. Swan that the appraisers for the Authority agreed with his appraisal except for the rights or interests that were being appraised.

The Court: That will still be sustained, and exception allowed.

Mr. Powers: Note our exception.

(The following occurred back in the hearing of the jury:)

Mr. Powers: I believe that's all."

The foregoing discloses that the Appellants undertook to prove that Mr. Swan heard an unidentified person, who he *understood* was Chairman of the Authority, at a meeting of six or seven persons *representing* the Authority, say that the appraiser for the Authority (who was also unidentified) agreed with Mr. Swan's *original* appraisal—not necessarily the appraisal heard by the jury.

73 O.S. 1961, § 152(e), provides in part as follows:

"* * * Three (3) members of the Authority shall constitute a quorum and *the vote of three (3) members shall be necessary for any action taken by the Authority* * * *."

And 73 O.S. 1961, § 161, provides in part as follows:

"In addition to all other powers expressly conferred, *the Authority is hereby authorized* and empowered:

* * * * * *

"(d) To acquire, hold and dispose of real and personal property in the exercise of *its* powers and the performance of *its* duties under this act.

"(e) To acquire by purchase or otherwise * * * such * * * property * * * as *it* may deem necessary * * *.

"(f) To make and enter into all contracts and agreements * * *.

* * * * * *

"(j) To do all things necessary or convenient to carry out the powers expressly granted in this act."

The foregoing demonstrates that neither the Chairman nor any other member of the Authority was authorized to bind the Authority or make any admissions binding on the Authority. The concurrence of at least three members thereof was necessary to bind the Authority.

> "Statements of a public officer in the absence of express authority are not competent against the national or a state government or agency thereof; and while in some instances the declaration of an official may constitute an admission of the federal or state government or agency, even where the necessary authority is conferred the statement is admissible only if it was made within the scope of such authority, and contemporaneously with the event or transaction involved." 31A C.J.S., Evidence, § 359.

It is noted that the Appellants did not prove or offer to prove either the identity or authority of the declarant. It is further noted that the declaration was made during negotiations had with an obvious view to settle and compromise the case. The applicable rule is stated in *Benzel v. Pitchford*, 206 Okla. 672, 674, 245 P.2d 1131, 1133 [8], as follows:

> "* * * The evidence elicited in his cross-examination tended to show that defendant had made a solemn admission under oath, accompanied by the tender of $1,350, to the effect that he did not know whether he owed plaintiff the commission or not. * * * but such admission was made for a special purpose and when that special purpose failed the defendant should not have been embarrassed in the trial of the cause by introdu tion of such statement or admission. The statements or admissions here involved were somewhat akin to statements and admissions made in or in con-

nection with an effort at compromise, and such statements upon failure of the compromise efforts are not admissible in subsequent trial of the cause * * *."

It is also noted that Appellants did not prove or offer to prove any attempt to subpoena the declarant or obtain his deposition. *Moral Insurance Company* v. *Fechtel*, Okla., 280 P.2d 716, 717, holds as follows:

> "* * * The record does not show any proper or sufficient attempt by Moral to obtain the presence or deposition of Roof for the trial. In 20 Amer. Juris., Evidence, Sec. 556, the general rule is stated that declarations against interest are not admissible if the declarant is available as a witness."

Lastly, Appellants did not prove or offer to prove Mr. Swan's *original* appraisal was the same, or nearly the same, as the final appraisal he testified to at the trial—the record does not disclose the amount of the appraisal involved in the purported declaration.

Proposition III

A

The third proposition contends Appellee was guilty of misconduct in two particulars, the first being that Appellee brought a large mural into the courtroom, forcing Appellants to object. Appellants say this caused the jurors to think the mural, which they never saw, was indecent or obscene.

The mural was a wall decoration which had hung in the front (west) part of Sussy's restaurant (C-M. 574), and Appellee attempted to have the same identified by the wit-

ness, Frank Boyer. The court sustained Appellants' objection to the proceedings, and the mural was taken from the courtroom.

Appellants' Exhibit D-52 (C-M. 332-337) was an inventory of the Sussy's property showing the claimed value of each item, in which the following entries appear (C-M. 333):

"Murals Painted on Walls 550.00"

Mr. Samara was asked the following question regarding said Exhibit D-52, and gave the following answer (C-M. 321):

"Mr. Harris: If you were testifying to the value of these various articles that you have listed on it, would your testimony be the same as you have listed after each article as of June 8, 1961?

A. There would be a very slight reduction for depreciation from the period of February, 1961, to June—from February, 1961, to June, 1961."

Appellants, therefore, injected the murals and their value into the trial as issues. The witness, Mr. Gerald Carlile (C-M. 545-572), placed a lower value on said murals as shown by Plaintiff's Exhibit P-25 (C-M. 559-562), containing the following entries (C-M. 560):

"Sussy's—*West Room*

"* * *

"5 ea. Wall Murals 4' x 12' Oil Paintings)
" " 4' x 38" " ") 150.00"

And Mr. John Bozalis (C-M. 525-533) testified as follows (C-M. 532):

Q. "The mural on the walls and things of that nature?

A. Yes.

Q. You did include those?

A. I would those particular murals because they were no more than a good paint job."

It appears, therefore, that the quality and value of the murals were disputed issues in the trial, and said issues were raised by Appellants. The record does not disclose the reason for Appellants' objection to admitting the murals in evidence; it is not shown that the murals were indecent or obscene, nor does anything appear in the record to warrant the inference that the jury would conclude they were indecent or obscene.

B

The gist of Appellants' second contention of misconduct is:

> "In interrogating Jake Samara, the principal owner of the property, counsel for appellee asked him if he had not signed documents under penalty of perjury that his total cost of equipment in Shangri-La was $18,599.48, and that he had depreciated it through 1960 to $16,416.23. Counsel for appellants objected to this line of questioning, which objection was sustained. The appellee well knew this line of questioning was not admissible, but by forcing the objection, the prejudicial implication was made that there was something being concealed, and that Samara had made false income tax returns."

Appellant Jake Samara testified on direct examination as follows (C-M. 273):

Q. "Was that a profitable business so far as you were concerned, Jake?

A. Yes, sir. It was very profitable."

And (C-M. 319):

Q. "What is your opinion as to the value?

A. Well, not including anything for goodwill and loss of earnings, I base the cost of $430,000."

The cost of the properties and whether the businesses were profitable were proper subjects for inquiry on cross-examination—these issues having been raised on direct examination.

Briefly stated, the cross-examiner incorporated specific figures in his questions and asked Mr. Samara if his records did not show such figures to be true, or whether he had not signed statements that the such figures were true. Mr. Samara consistently denied they were true or that he had ever signed such statements.

Notwithstanding his sworn testimony, he swears in his affidavit (attached to the Amendment to Motion for New Trial, C-M. 609) that the figures are identical, or nearly so, to those on his 1959 and 1960 income tax returns. It is not specified whether he refers to State or Federal returns or both, and no returns or copies thereof are attached to the affidavit in support thereof.

He further swears (in said affidavit) that the figures on said returns were not available from any source other than his tax returns (in turn, available only to himself and his tax attorney); this, in spite of his testimony as follows (C-M. 350):

Q. "Now, did you—do you keep books and records of these things?

A. No, sir.

I have a certified public accountant who keeps them."

Appellants then reason that since, according to the affidavits, the information must have been obtained from tax returns, and the use thereof was a violation of privilege, and since such use of the figures was an implication "* * * that Samara had made false income tax returns," the 14th Amendment has been violated.

Application of Unbach, Okla., 350 P.2d 299, 301, holds:

> "* * * once a person had made the amount of his income an issue in litigation it becomes a legitimate subject of inquiry and he can no longer claim that the information contained in his returns is confidential."

When Mr. Samara testified to matters contradicted by his tax returns, he waived any privilege that may have existed before he rendered the information contained in said returns relevant and material to the issues in the case. The court could have ordered him to produce said returns or copies thereof. But even so, it has not been shown that any tax returns were mentioned to the jury or used by the cross-examiner. So far as the jury could know, the cross-examiner had no basis for the figures used. The fact that there was no follow-up more probably prejudiced Appellees in the eyes of the jury.

Proposition IV

Appellants contend that the totality of errors committed by the state courts results in a deprivation of due process under the 14th Amendment. Appellees contend that the errors alleged by Appellant, as shown by the record itself, simply do not exist. The jury awarded Appellants $43,902.80 more than the lowest figures testified to by the witnesses. The allegation that Mr. Bozalis testified to square footage replacement value, which was considered by the jury as the fair market value of the total property taken, is refuted by the record itself; the admonition of the trial court to the jury, and by the instructions given. There is no basis for the contention that the proffered mural prejudiced the Appellants, and the allegation that the jury inferred the mural was obscene is mere speculation. The allegation that the exclusion of a purported conversation between Appellants' witness and a third person who was supposedly a member of the Capitol Improvement Authority was prejudicial is also unsupported since Appellants failed to show who the conversation was with, and at any rate, as a matter of law, the third party was totally without authority to bind the Authority and the State in any manner whatsoever. The Appellants' allegation that the Appellees wrongfully questioned Mr. Samara about his income tax returns is again unsupported by the evidence since the record does not show where the figures came from, and that Appellant had waived any privilege that he may have had in the first instance by opening the subject of his income. The final allegation that the totality of errors amounted to a deprivation of due process under the

14th Amendment must necessarily fall since the purported errors simply do not exist.

CONCLUSION

For the above reasons, Appellee submits that the Motion to Dismiss or Affirm be granted.

Respectfully submitted,

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April, 1965